

3- 3100- 7 388-2

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE  
HEARINGS  
FOR THE MINNESOTA DEPARTMENT OF VETERANS AFFAIRS

Neil C. Anderson,

Petitioner,

FINDINGS OF FACT,

CONCLUSIONS OF LAW

v

AND

RECOMMENDATION

McDavitt Township,

Respondent.

The above-entitled matter came on for hearing before Administrative Law Judge Allen In Gies on March 29, 1993 at 10:00 a.m. in the Town Hall of McDavitt Township, in Zim, Minnesota.

Patrick I Roche, Attorney at Law, The Tr-  
enti taw Fir-m, 1000 Lincoln  
Building, P.O. Box 958, Virginia, Minnesota 55792  
, appeared on behalf of  
Petitioner Neil C. Anderson. Kenneth D. Butler,  
Attorney at Law, C I n e ,  
Eaton, 1, Butler- Law Office, Suite 1400, Alworth  
Building, 306 West Superior  
Street, Duluth, Minnesota 55802-1894, appeared  
on behalf of Respondent  
McDavitt Township.

The record of this proceeding closed on April 13, 1993 upon receipt of Post-hearing memoranda from the parties.

This Report is a recommendation, not a final decision. The Commissioner of Veterans Affairs will make the final decision after a review of the record. The Commissioner may adopt, reject, or modify the Findings of Fact, Conclusions and Recommendations contained herein Pursuant to Minn. Stat. 14.61, the final decision of the Commissioner shall not be made until this

Report has been available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by the this Report to file exceptions and present argument to the Commissioner. Parties should contact Mr. Bernie R. Melter, Commissioner of Veterans Affairs, 2nd Floor - Veterans Service Building, 20 West 12th Street, St. Paul, Minnesota 55155 to ascertain the procedure for filing exceptions or presenting argument.

#### STATE OF ISSUES

Whether the elimination of administrative and supervisory functions from Petitioner's job duties and the abolishment of the job title "Road Overseer"

constitute a removal in violation of Minn. Stat. 197.46; and if a removal has occurred, whether the removal is excused because it was the result of a good-faith abolition of the position.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

#### FINDINGS OF FACT

1. Petitioner Neil C. Anderson is a veteran of the United States Army who entered active service on July 25, 1950 and separated from service on July 24, 1953 with an honorable discharge.

2. Mr. Anderson resides at 8775 Zim Road, Zim, Minnesota. He has been retired since July, 1987. He has been continuously employed by McDavitt Township on a part-time basis (including after his retirement from full-time work) since 1977 or approximately 16 years. St. Anderson continues to be employed on a part-time basis by McDavitt Township.

3. Between 1977 and 1992, Mr. Anderson was appointed each year to the position of Road Overseer by the McDavitt Township Board ("Town Board"). As Road Overseer, Mr. Anderson's job functions include grading and plowing roads, keeping the sides of roads free from brush and debris, mowing the sides of roads, installing culverts when necessary, monthly checking road signs, and performing other tasks as necessary to keep the roads in good traveling condition.

4. Mr. Anderson has no regularly scheduled hours; he works at his convenience. He is paid on an hourly basis, plus any mileage incurred while performing his duties.

5. Over the term of his employment, Mr. Anderson assumed job functions that were not originally assigned to the Road Overseer. Mr. Anderson assumed administrative and supervisory responsibilities for the Township roads. These additional functions included hiring and supervising part-time laborers,

negotiating or arranging contracts for purchase of materials and establishing road grading schedules as needed. The Town Board acquiesced in his assumption of these functions.

6. The supervisory and administrative functions assumed by Mr. Anderson amounted to five percent of his job as a Road Overseer,

7. McDavitt Township is governed by the McDavitt Township Board ("Town Board") consisting of three Board members who are elected annually on staggered terms. Each year shortly after an election, the Town Board reorganizes dividing up supervisory and administrative responsibility for Township departments. The Township departments included, for example, Recreation and Parks, Cemeteries, Roads, and Law Enforcement.

8. The -Town Board member assigned to be Road Supervisor has administrative and supervisory control over the maintenance of roads for McDavitt Township. The Road Supervisor has the authority to hire and fire laborers, contract on behalf of the town to purchase supplies and equipment

subject to Board approval , and  
authorize and direct road projects as  
needed  
during the year. As Road Overseer Mr.  
Anderson is supposed to work under the  
supervision and control of the Town Board member who became Road  
Supervisor.

9. The Board recognized that Mr.  
Anderson Chad taken upon himself the  
administration and supervisory functions  
usually reserved to the Road  
Supervisor. The Board unsuccessfully  
sought to clarify with Mr. Anderson his  
role as Road Overseer with the role  
of the Road Supervisor. When this failed,  
the Board decided that it would be  
necessary to terminate the t i t l e Road  
Overseer.

10. The Town Board annual  
reorganizational meeting was held on  
March 11,  
1992. At the meeting the position title of Road Overseer was  
terminated. The  
position of Road Overseer was not  
assigned to anyone at that meeting.  
Exhibit  
2 incorrectly states that the Town Board elected  
official who became  
Road  
Supervisor was appointed as Road Overseer.

11. After the March 11, 1992  
reorganizational meeting, Mr. Anderson  
continued h i s original du t i e s related  
to road maintenance; he no longer  
performed any administrative or supervisory  
functions.

12. Over the term of h i s  
employment, Mr. Anderson assumed  
functions  
associated with the Parks and  
Recreation Department of McDavitt  
Township.  
These functions included odd jobs such  
as lighting the ice skating rink  
warming house stove, supervising rink  
maintenance employees in the winter, and  
groundskeepers in the summer, and  
occasionally grooming the cross-country ski  
trail.

13. A Town Board elected official  
is assigned as Parks and Recreation

Supervisor at the annual Town Board reorganizational meeting. The Parks and Recreation Supervisor has the responsibility of administrative control and supervision for the Parks and Recreation Department including hiring and supervising employees. Although the Board acquiesced in Mr. Anderson's performing administrative and supervisory functions for the Parks and Recreation Department, he was never appointed to a position with the Parks and Recreation Department.

14. In 1992 Mr. Anderson voluntarily quit his involvement with the Parks and Recreation Department. He quit grooming the ski trails due to wear and tear on his snowmobile. Because the woodburning stove in the ice skating rink warming house was replaced by a propane stove, it was no longer necessary for him to light the fire in the warming house. Mr. Anderson has not contacted the Parks and Recreation Supervisor regarding the performance of any other job functions for the Department.

15. In 1991, before the changes in his employment status, Mr. Anderson's earnings were approximately \$5,075.00; his 1992 earnings were approximately \$3,070.00.

16. Mr. Anderson was not given a hearing "upon stated changes in writing" before the removal of his supervisory and administrative duties and the abolishment of the title of Road Overseer.

17. Mr. Anderson filed a Petition for Relief under the Veterans Preference Act with the Minnesota Department of Veterans Affairs alleging that he had been removed from his position of "overseer" of the McDavitt Township roads and Parks and Recreation" without notification and without reason given for his removal; he therefore concluded that his rights under the Veterans Preference Act has been violated. A Notice of Petition and Order for Hearing was issued by the Minnesota Department of Veterans Affairs establishing a contested case hearing to determine whether or not the Veterans Preference Act had been violated with respect to Mr. Anderson's removal from employment with McDavitt Township. A hearing on the Petition was held March 29, 1993 at the town hall in Zim, Minnesota.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

#### CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Commissioner of Veterans Affairs have jurisdiction in this matter pursuant to Minn. Stat. 14.50 and 197.481. The Notice of Hearing was proper in all respects and the Department has complied with all relevant procedural and substantive provisions of law and rule.

2. The Petitioner, Mr. Neil C. Anderson, is an honorably discharged veteran entitled to all the protections of the Veterans Preference Act.

3. Minn. Stat. 197.46 prohibits the removal of a veteran from public employment except for incompetency or misconduct shown after a hearing, upon due notice and upon stated charges in writing. However, public employers may abolish positions notwithstanding the Veterans Preference Act if the abolition of the position is in good faith.

4. The burden of proof is upon the Petitioner to prove by a preponderance of the evidence that he was removed from a job in violation of Minn. Stat.

197.46. Respondent's claim that Petitioner's position was abolished in good faith is an affirmative defense for which Respondent has the burden of proof.

5. Petitioner has failed to prove by a preponderance of the evidence that administrative and supervisory functions were rightfully a part of his job duties.

6. Respondent's elimination of supervisory and administrative functions from Petitioner's job duties does not constitute a "discharge . . . from an appointed position or employment within the meaning of Minn. Stat. 197.46.

7. If it is concluded that the Veterans Preference Act applies in this case, the Town Board's abolishment of the Road Overseer title is a reasonable exercise of administrative discretion excused from the requirement!; of notice and hearing. Gorecki v. Ramsey County, 437 N.W.2d 646 (Minn. 1989).

8. Because Petitioner ceased working in the Parks and Recreation Department on his own volition, no Veterans Preference Act issue arises from those job duties.



Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

#### RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED: That the Commissioner of Veterans Affairs dismiss the Petition of Neil C. Anderson.

Dated: April 30, 1993.

ALLEN E. GILES  
Administrative Law Judge

#### NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Taped, no transcript prepared.

#### MEMORANDUM

##### Failure of Proof

The Veterans Preference Act (Act) requires notice, stated charges and hearing before an honorably discharged veteran is removed from public employment. Minn. Stat. 197.46 provides in relevant part as follows:

Any person whose rights may be in any way prejudiced contrary to any of the provisions of this section, shall be entitled to a writ of mandamus to remedy the wrong.

No person holding a position by appointment or employment in the several counties, cities, towns, school districts and all other political subdivisions in the state, who is a veteran separated from the military service under honorable conditions, shall be removed from such position

misconduct or employment except for incompetency or  
charges, shown  
after a hearing, upon due notice, upon stated  
in  
writing.

intent Any veteran who has been notified of the  
to  
discharge the veteran from an appointed  
position or  
employment pursuant to this section shall be not  
ified in  
writing of such intent to discharge and of the vete  
ran's  
right to request a hearing within 60 days of  
receipt of  
the notice of intent to discharge.

Mr. Anderson continues to be employed by McDavitt Township having primary responsibility for maintenance of Township roads. He claims, however, that the elimination of supervisory and administrative duties constitute a "removal" within the meaning of Minn. Stat. 197.46. As the

Petitioner in this proceeding NW. Anderson must prove by a preponderance of the evidence that a removal has occurred.

The Administrative Law Judge has concluded that Mr. Anderson has failed to meet this burden of proof. The supervisory and administrative functions assumed by Mr. Anderson were not a part of his original job functions. Over the term of his employment with McDavitt Township, he assumed these additional functions- The supervisory and administrative functions were the responsibility of the Town Board elected officially assigned responsibility for Township roads, the Road Supervisor.

Mr. Anderson cannot rightfully claim duties that were not his to perform.

Thus he has failed to prove that the supervisory and administrative functions were a part of his job.

#### Additional Duties

Mr. Anderson argues that the supervisory and administrative functions were it part of his job because the Town Board cover it me acqui esced in his performing those functions. The Town Board did allow him to perform administrative and supervisory functions. Because these functions were not a part of the duties of his original job, the administrative and supervisory functions must be considered as duties es in addition to the duties he was

originally hired to perform. Mr. Anderson claims that because he no longer performs the additional duties he has been "removed" from a "position" in public employment in violation of the Veterans Preference Act.

Record establishes that Mr. Anderson continues to be employed, performing the original duties for which he was hired by McDavitt Township. Thus, the question presented is whether the additional duties and supervisory and administrative duties ) constitute a "position" from which a removal could occur so as to trigger the Veterans Preference Act's requirements of hearing and notice.

The Administrative Law Judge has concluded that the administrative and supervisory duties do not constitute a themselves "position" for the following reasons.

First, these functions, administrative and supervisory, are vested in the Road Supervisor, the elected official having responsibility for Township roads. Therefore, to allow Mr. Anderson to exercise supervisory and administrative functions is contrary to the way the Township conducts its business.

'Second, the additional duties were not a part of Mr. Anderson's original assignment and were not at any time affirmatively assigned to him.

Finally, because the additional duties were assumed without authority, performance of the duties was temporary subject to formal action by the Town Board. For these reasons, the Administrative Law

Judge concludes as a matter of law  
that the "additional duties" assumed by  
Mr. Anderson do riot constitute it "position" for which  
Veterans Preference Act  
protections apply.

While there are no cases  
directly on point, analogous  
treatment of "duties" is suggested by  
additional law. For example, it has  
case law. For example, it has  
been established that the Veteram  
Preference Act does not apply  
to employments  
that are occasional or temporary in nature. Crnkovic v. ISD  
No. 701,  
142 N.W.2d 284, 286 (Minn. 1966);  
State v. Mangni, 42 N.W.2d 529  
(Minn. 1950). Several recent administrative  
decisions have addressed the  
issue of "additional duties"  
whether constitute a "position" under  
the Veterans

Preference Act . For example, in Steven M. Markuson and Walter J. Kudronv. .  
City of Minnetonka, OAH File Nos. 4-3100-6408, 6409-2,  
(July 20, 1992)  
(affirmed by the Commission of Veterans Affairs  
(September 18, 1992), the  
Petitioners had been assigned the duties of Corporal by the Police Chief for  
the Minnetonka Police Department. Each Petitioner  
continued in that  
assignment for several years but then was reassigned, by a new  
Police Chief ,  
to their original duties of patrolman. The Petitioners  
received a pay  
increment as Corporals and had quasi-supervisory  
responsibilities over  
patrolmen on their shift. Administrative Law Judge Peter  
Erickson concluded  
that the additional duties of Corporal did not constitute a  
position under the  
Veterans Preference Act. A similar conclusion was reached  
and upheld by the  
Commissioner of Veterans Affairs in John M. Winkler,  
Petitioner v. St. Louis  
County, Respondent; OAH File No. 4-3100-6911-2, (November 3,  
1992). In  
conclusion, analogous decisional law supports the  
conclusion that the  
additional functions assumed by Mr. Anderson did not  
constitute a position  
under the Veterans Preference Act.

#### Abolishment of Road Overseer Title

The Administrative Law Judge is mindful of the fact  
that the position  
held by Mr. Anderson, Road Overseer, was abolished by  
the Town Board.  
However, even if it is concluded that the Veterans  
Preference Act's  
protections apply in this case, the Town Board's failure to  
comply with the  
Veterans Preference Act is excused because it arose out of  
an reasonable and  
bona fide administrative decision by the Town Board.  
Gorecki v. Ramsey  
County, 437 N.W.2d 646 (Minn. 1989). According to  
Gorecki, the Veterans  
Preference Act should not be viewed as restricting McDavit  
Township Board's  
exercise of control over its administrative affairs.  
The Town Board's  
abolishment of the Road Overseer position was a reasonable  
administrative  
decision for the following reasons. Supervisory and  
administrative control

responsibilities for Township roads was vested in the Town Board member assigned as Road Supervisor. Mr. Anderson's performance of these functions was inconsistent with the manner in which the Township managed its Departments. Discussions (that included At. Anderson) were held to define Mr. Anderson's role as Road Overseer; in relation to the role of Road Supervisor. Those discussions failed.' To remedy the problem the Town Board abolished the position title of Road Overseer. It was not reasonable to have both Mr. Anderson and the Road Supervisor exercising administrative control over Township roads. The elimination of the Road Overseer title was a reasonable exercise of the Town Board's administrative discretion.

Finally, it should be noted that the Road Overseer position was not assigned to another person. Exhibit 2, the minutes of the March 11, 1992 Board reorganizational meeting, incorrectly states that the Road Overseer position was reassigned. The Town Clerk (person who prepared the minutes) testified that this was an error.

A.E.G.

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I. The Administrative Law Judge acknowledges that there was and continues to be considerable animosity that arose from those discussions.